IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-1166

MILTON CLARK, FREDERICK W. ROST, ST. REGIS APARTMENTS, LTD., a California limited partnership; MELVIN BALSER, *Managing Agent, on behalf of themselves and all others similarly situated;*

PHILADELPHIA GAS WORKS,
Plaintiff-Intervenor, Petitioner

v.

GULF OIL CORPORATION

and

TEXAS EASTERN TRANSMISSION CORPORATION

Petition for a Writ of Certiorari To the United States Court of Appeals For the Third Circuit

A. GRANT SPRECHER
BARTON A. HERTZBACH
OBERMAYER, REBMANN, MAXWELL & HIPPEL
14th Floor Packard Building
Philadelphia, Pennsylvania 19102

CHARLES D. ABLARD
OBERMAYER, REBMANN, MAXWELL & HIPPEL
Suite 500
2011 I Street, N.W.
Washington, D.C. 20006
Attorneys for Petitioner, Philadelphia Gas Works

THE LEGAL INTELLIGENCER, 66 NORTH JUNIPER STREET, PHILA., PA. 19107 (215) 561-4050

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No.

Milton Clark, Frederick W. Rost, St. Regis Apartments, Ltd., a California limited partnership, Melvin Balser, Managing Agent, on behalf of themselves and all others similarly situated;

Philadelphia Gas Works,
Plaintiff-Intervenor, Petitioner

v.

Gulf Oil Corporation

And

Texas Eastern Transmission Corporation

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Philadelphia Gas Works petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this case on December 30, 1977.

OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, is printed in Appendix A, pp. A3-A23.[1] The opinion and orders of the United States District Court for the Eastern District of Pennsylvania, not yet reported, are printed in Appendix C, pp. A31-A50.

JURISDICTION

The judgment of the Court of Appeals was entered on December 30, 1977 (Appendix B, pp. A27, A28). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether a private cause of action for relief is to be implied in favor of Philadelphia Gas Works against a producer of natural gas for violation of sections 7(b), (c) and (e) of the Natural Gas Act.

STATUTES INVOLVED

Sections 7(b), (c), (e), and 22 of the Natural Gas Act, 52 Stat. 824, 833 (1938), as amended, 15 U.S.C. §§717f(b), 717f(c), 717f(e), and 717u, are set forth in Appendix D, pp. A53-A55.

1. The Appendices to this Petition containing the opinions below, the judgment, and texts of the statutes involved have been printed in the back of this volume.

STATEMENT OF THE CASE

This petition involves issues related to the companion case of *Gulf Oil Corp. v. Federal Power Commission*, 563 F.2d 588 (3d Cir. 1977), in which Philadelphia Gas Works ("PGW") was an intervenor-appellee. The companion case is presently before this Court on a petition for a writ of certiorari to the Court of Appeals. *Gulf Oil Corp., supra, petition for cert. docketed sub nom. Gulf Oil Corp. v. Federal Energy Regulatory Commission*, No. 77-596 (Oct. 25, 1977).[2] Both cases arise from Gulf Oil Corporation's violation of its certificate of public convenience and necessity and violation of the Natural Gas Act, 52 Stat. 821 (1938), as amended, 15 U.S.C. §717 *et seq.*

In the companion case, the Court of Appeals affirmed the order of the Federal Power Commission (the "Commission") requiring Gulf Oil Corporation to deliver greater quantities of gas than it had been delivering, and ordering refunds by Gulf. The instant case was heard by the same panel of the Court of Appeals and this petition raises the limited issue of whether a private cause of action for relief is implied for a violation of the Natural Gas Act.

Factual History

Reference to the detailed factual background of the companion case will provide a fuller understanding of the significance of the instant proceeding. (*See* Gulf Oil Corporation's Petition for a Writ of Certiorari; Comp. Case App. A, pp. 1a-28a, 48a-52a; Comp. Case App. D, pp. 67a-78a.) A synopsis of the facts necessary to an essential understanding of this case is set forth below.

The petitioner, PGW, is a municipally owned gas distribution facility serving primarily residential, as well as certain commercial and industrial users within the City of Philadel-

2. The opinions of the Court of Appeals and the Federal Power Commission in the companion case are set forth in Appendices to Petition for Writ of Certiorari, *Gulf Oil Corp. v. Federal Energy Regulatory Commission*, No. 77-596 (petition for cert. docketed Oct. 25, 1977). Those Appendices will be cited hereinafter as "Comp. Case App.," and reference shall be to the page numbers as used therein (*e.g.*, Comp. Case App. A, pp.).

phia. For almost thirty years, and at all times relevant hereto, PGW has been a customer of Texas Eastern Transmission Corporation ("Texas Eastern"), a pipeline company. Texas Eastern is one of two such pipeline companies who supply in excess of 97 percent of the natural gas consumed in the City of Philadelphia.

In 1963, Texas Eastern entered into a gas purchase contract with Gulf Oil Corporation ("Gulf") for the purchase of approximately 4.4 trillion cubic feet of gas. Pursuant to the Natural Gas Act, the Federal Power Commission (the "Commission") approved this contractual arrangement and issued a certificate of public convenience and necessity on December 19, 1963. *Gulf Oil Corp.*, 30 FPC 1559 (1963). Under the certificated contract Gulf agreed to supply Texas Eastern with natural gas over a 26 year period at a price not to exceed 21 cents per thousand cubic feet (Mcf). In the contract embodied in the certificate, Gulf warranted to Texas Eastern that it would provide a minimum daily quantity of gas of up to 625,000 Mcf subject to Texas Eastern's demand for delivery of that amount.

Since January 1, 1971, Texas Eastern has regularly demanded of Gulf the maximum of 625,000 Mcf per day; however, Gulf has failed to fulfill its contractual and statutory obligations. On November 7, 1975, the Commission issued an order directing both Texas Eastern and Gulf to show cause why they were not in violation of the certificate of public convenience and necessity. PGW and its customers intervened in those proceedings, and after hearings, the Commission issued Opinion No. 780, 10 F.P.S. (Bender) 5-761, Fed. Util. L. Rep. (CCH) ¶11,869 (filed October 15, 1976) (Comp. Case App. D. pp. 67a-94a).

In Opinion No. 780, the Commission found that Gulf had violated its certificate and contract obligations, and thus had violated section 7(c) of the Act. Gulf was ordered to comply with its contract and statutory obligations in the future. In addition, the Commission ordered Gulf to pay to Texas Eastern a refund which was to be passed through to the latter's customers, including PGW.

The amount of the refund was to be a sum equal to the difference between Texas Eastern's request for gas and Gulf's

deliveries multiplied by the difference between the contract price and the otherwise applicable area or natural rates and interest. The Commission provided that Gulf could recoup the payments when the volume remaining to be deliverd under the contract equaled the deficiencies, but ordered continuous refunds if Gulf's future deliveries did not comply with Texas Eastern's demands. The effect of the refund order is merely to deprive Gulf of the present value of the money. The refund is not analogous to damages, reparation, or penalties since Texas Eastern's customers ultimately must repay the money obtained under the refund order. Thus, the refund order is more in the nature of a temporary performance bond. *Gulf Oil Corp. v. F.P.C., supra* (Comp. Case App. A, p. 37a).

The Commission acknowledged that the actual costs of replacement gas secured by Texas Eastern and its customers could have exceeded those assumed in the refund formula; nonetheless, the Commission regarded the formula as the most efficient and immediate method of compensating the aggrieved customers. In fact, PGW suffered replacement costs which greatly exceeded the national price of gas adopted in the Commission's formula. Consequently, PGW sought rehearing on the issue of the proper measure of damages.

On December 9, 1976, the Commission issued Opinion No. 780-A, 11 F.P.S. (Bender) 5-201, Fed. Util. L. Rep. (CCH) ¶11,882 (1976) (Comp. Case App. E, pp. 95a-116a). The Commission noted that the relief afforded by its refund formula might not in fact fully compensate Gulf's customers and ultimate consumers for the damages they had incurred. In addition, the Commission decided that the refunds that it ordered did not prevent PGW from seeking additional relief in the forum of its choosing. (Opinion No. 780-A, Comp. Case App. E, pp. 110a, 111a).

On review, the Court of Appeals affirmed the Commission. *Gulf Oil Corp. v. F.P.C., supra*, Comp. Case App. A, pp. 1a-58a. The companion case is now before this Court on a petition for a writ of certiorari. *Gulf Oil Corp. v. Federal Energy Regulatory Commission*, No. 77-596 (Petition for cert. docketed Oct. 25, 1977).

Procedural History

On July 2, 1976, a purported class action was filed in the United States District Court for the Eastern District of Pennsylvania against Gulf and Texas Eastern. *Clark v. Gulf Oil Corp.*, Civil Action No. 76-2106 (E.D. Pa. 1976). The named plaintiffs purported to represent consumers of natural gas in the Philadelphia area, the area supplied by PGW. Plaintiffs sought damages, equitable relief, and costs for injuries incurred by virtue of Gulf's violation of the Natural Gas Act. Jurisdiction of the District Court was invoked pursuant to section 22 of the Natural Gas Act, 52 Stat. 833 (1938), as amended, 62 Stat. 875, 895 (1948), 15 U.S.C. §717u (Appendix D, p. A55).

Subsequently, another purported class action was filed, *Thompson v. Gulf Oil Corp.*, Civil Action No. 76-2711 (E.D. Pa. filed Aug. 26, 1976) alleging similar causes of actions. The District Court consolidated *Clark* and *Thompson*. PGW was granted to intervene in *Clark* (Appendix C, p. A47).

PGW asserted that Gulf had violated sections 7(b), (c) and (e) of the Natural Gas Act by failing to deliver the maximum amount of gas requested by Texas Eastern. PGW asserted that Texas Eastern had also violated the same provisions of the Act in failing to exercise due diligence in protecting its customers' statutory rights. PGW bore the cost of replacing the gas which Gulf failed to deliver. PGW alleged that the actual cost of this replacement gas was in excess of the cost assumed in the Commission's refund formula. Hence, PGW sought specific relief in order to recover its full damages. While Gulf could recoup appropriate portions of the additional relief, PGW would be assured full relief absent Gulf's future performance. PGW would also benefit from the time value of the additional relief even if Gulf did perform. This benefit would compensate PGW for the time value of the money expended by it for the replacement gas.

In seeking full relief, PGW argued in the District Court that there was to be implied a private cause of action against Gulf and Texas Eastern as a result of their violations of the Natural Gas Act. The District Court held that no private cause of action existed under the Act and granted Gulf's motion to dismiss (Appendix C, pp. A31-A50). The District Court, however, recognized the importance of the issue's relationship to the national crisis in the supply of natural gas and the possible conflict with a decision in another circuit. Therefore it certified the issue under 28 U.S.C. §1292(b) as to the implication of a private cause of action against Gulf.

The Court of Appeals granted permission to appeal by order dated April 26, 1977, and this appeal was heard by the same panel which decided the companion case. The Court of Appeals unanimously affirmed the District Court (Appendix A, pp. A3-A23).[3] On the question presented here, the Court of Appeals concluded that no private cause of action for damages was to be implied under the Natural Gas Act in favor of retail distributors and ultimate consumers.

While the Court of Appeals held that the District Court had subject matter jurisdiction in this case, it found that an implied cause of action was inappropriate due to the absence of two of the four factors set forth in *Cort v. Ash*, 422 U.S. 66 (1975). Specifically the court held that although PGW is among the class for whose especial benefit the statute was enacted (first *Cort* test), it was neither the legislative intent (second *Cort* test) nor in accordance with the purpose of the Natural Gas Act to imply a private cause of action in favor of PGW (third *Cort* test). The Court below found the fourth *Cort* test to be irrelevant.

In so holding, the court distinguished *Farmland Industries, Inc. v. Kansas-Nebraska Gas Co., Inc.*, 486 F.2d 315 (8th Cir. 1973) which held that there was an implied private cause of action in favor of a consumer against a natural gas company who had violated section 7(b) of the Natural Gas Act.

3. On January 23, 1978, the court granted PGW's Motion for Stay of issuance of its mandate to and including February 19, 1978, and upon the filing of this Petition, until this Court disposes of the case.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Is in Conflict With Congressional Policy Expressed in the Natural Gas Act, and Presents Important Questions of Private Remedies and Administrative Regulation Which Should Be Resolved by This Court.

The Court of Appeals has held that retail distributors such as PGW and ultimate consumers of natural gas may not bring a private action under the Natural Gas Act seeking relief for injuries caused by a natural gas company's repeated and extended violations of sections 7(b), (c), and (e) of the Natural Act. Interpreting the Act, the Federal Power Commission decided that its refund order in the companion case did not prevent PGW from seeking additional relief. However, the Court of Appeals held that a private action brought under the Act for such relief was not intended by Congress and is not consistent with the purposes of the Act. In so construing the Natural Gas Act which was designed to protect consumers' interests in an industry essential to the health and welfare of the nation, the decision of the court below presents federal questions of major and continuing interest which should be resolved by this Court.

In reaching its conclusions, the Court of Appeals applied the tests set forth by this Court in *Cort v. Ash*, 422 U.S. 66 (1975), and decided that the instant case did not meet two of those four tests.[4] Specifically, the court determined that a private action was neither intended by Congress nor consistent with the purposes of the Act.

Regarding congressional intent, the court held that because the Natural Gas Act created a comprehensive and effective regulatory scheme for the interstate sale and transportation of natural gas, Congress did not contemplate a private right of action when that scheme was violated (*See* Appendix A, p. A19). However, the court below agreed with this Court that the "... aim of the Act was to protect ultimate consumers of natural gas from excessive charges." (Appendix A, p. A15), *quoting Federal Power Commission v. Interstate Gas Co.* 336 U.S. 577, 581 (1949). Thus, the Court of Appeals decided that Congress intended that consumers[5] would have only one federal remedy for violations of the Act: action by the Federal Power Commission.[6]

As previously stated, in Opinions No. 780 and No. 780-A, the Commission ordered Gulf to make refunds to Texas Eastern and ordered Texas Eastern to flow through those refunds to its customers. (Comp. Case App. D, pp. 67a-94a; Comp. Case App. E, pp. 95a-116a.) The Commission realized, however, that the relief it afforded might not fully compensate PGW for the damages it had sustained since PGW had incurred replacement costs in excess of those used in the Commission's refund formula. Consequently, the Commission decided that the refunds that it ordered did not

> ... prevent PGW or other customers and distributing companies served through Texas Eastern's system from seeking additional relief in whatever forum they choose if they find that relief inadequate. Neither Opinion No. 780 nor this opinion preclude such action, nor does the Commission take any position on the merits of such proceedings.

(Opinion No. 780-A, Comp. Case App. E, pp. 110a, 11a).

Thus, the Commission has decided that its broad administrative powers—which include control over the abandonment

4. First, is the plaintiff one of the class for whose especial benefit the statute was enacted? Second, is there any indication of legislative intent, explicit or implicit, either to create a private cause of action or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? Fourth, is the cause of action one traditionally relegated to state law, in an area basically the concern of the states, so that it would be inappropriate to infer a cause of action based solely on federal law? *Cort v. Ash*, 422 U.S. at 78.

5. A municipal gas corporation has an identity of interest with its consumers. *Northern Natural Gas Co. v. Federal Power Commission*, 215 F.2d 892 (8th Cir. 1954). *See also Texas Eastern Transmission Corp. v. Federal Power Commission*, 470 F.2d 757, 759 n.1 (5th Cir. 1972).

6. On October 1, 1977, the Federal Energy Regulatory Commission succeeded to the functions and duties of the Federal Power Commission under the Natural Gas Act. 91 Stat. 565 (1977), 42 U.S.C. §7101. References to the "Commission" are to both agencies.

and extension of service, and the power to bring actions to enforce the public interest in the face of violations of the act —do not preclude private causes of action on behalf of individuals injured by violations of the Act.

The Commission's interpretation of the Natural Gas Act should be accorded great weight. *Cf., Allen v. State Board of Elections*, 393 U.S. 544, 558, n.23 (1969) [Government position considered in deciding implied cause of action]. While the Commission's opinion alone does not enlarge or diminish the jurisdiction of federal courts, Section 22 of the Natural Gas Act explicitly confers on the district court

> . . . exclusive jurisdiction of violations of this chapter or the rules, regulations, and orders thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by, or to enjoin any violation of, this chapter or any rule, regulation or order thereunder.

(Appendix D, p. A55).

In the court below, PGW argued that Section 22, evinced a congressional intent to create an implied private cause of action on behalf of those intended beneficiaries of the Act, particularly where violations of section 7 occurred. PGW cited *J.I. Case Company v. Borak*, 377 U.S. 426 (1964) in which this Court held that a nearly identical jurisdictional section in the Securities Exchange Act of 1934,[7] showed an implicit congressional intent to create a private cause of action for a violation of that Act.

In construing *Borak*, the court below decided that a general grant of jurisdiction is not conclusive evidence of a congressional intent to provide a private remedy (Appendix A, p. A16). The court adverted to decisions subsequent to *Borak* in which this Court stated that private remedies may be implied if congressional purpose was likely to be undermined absent private enforcement. *Ibid, quoting Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1, 25 (1977). In *Piper*, this Court emphasized that *Borak* had implied a remedy because of the

7. Section 27 of the Securities Exchange Act of 1934 states in pertinent part:

practical limitations upon the SEC's enforcement capabilities. *Id.* Although the court below took notice of this, it proceeded to embark upon an analysis of the Commission's statutory regulatory and enforcement capabilities. While concluding that the Act was a comprehensive regulatory scheme and that the Commission had broad administrative powers (as did the SEC), the court nonetheless failed to consider the essential point: private remedies are implied because of *practical* limitations upon the regulatory effectivenes of the federal agencies.

The Court of Appeals apparently ignored the practical limitations of the Commission's ability to tailor remedies for all injuries sustained as the result of Gulf's violations.[8] This Court may take notice of a recently published report which details the difficulties encountered by the Federal Power Commission, given its limited resources, in protecting the interests of ultimate consumers. *See* Subcommittee on Oversight and Investigation of the House Committee on Interstate and Foreign Commerce, *Federal Regulation and Regulatory Reform*, 94th Cong., 2d Sess. (1976). In the instant case, the propriety of implication is implicitly supported by the Commission's approval of PGW pursuing a private cause of action. In effect, the Commission recognized that its broad remedial actions—taken to benefit highly diverse interests—did not provide remedies tailored to the particular harm suffered by Gulf's and Texas Eastern's distributors and customers.

The congressional aim of protecting consumers, such as PGW, is best served by allowing consumers to recover their full damages suffered as a result of violations of the Natural Gas Act. In disregarding the Commission's interpretation of its role and in misconstruing this Court's pronouncements in *Borak* and *Piper*, the court below has relegated consumers to

Footnote 7—*Continued*

> The district courts of the United States . . . shall have exclusive jurisdiction of violations of this chapter or the rules or regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules or regulations thereunder. 15 U.S.C. §78aa.

8. A majority of the court below did consider the thousands of contracts certified by the Commission, but did not consider their impact upon the Commission's ability to enforce the Act and fashion adequate specific relief for violations (Appendix A, pp. A21, A22 n. 12).

remedies provided by the Commission in administrative proceedings in which the consumers can only intervene.

While the relief provided in the companion case may be an equitable balancing of administrative convenience and consumer recompense, the Commission has implied that specific private enforcement is a permissible supplement to Commission action. This Court has agreed that such action may be necessary. *See Piper, Blue Chip Stamps v. Manor Drug Stores,* 421 U.S. 723, 730 (1975). Thus, private actions under the Act play a necessary role in affording aggrieved consumers adequate protection. The intent of Congress to protect consumers, reinforced by the view of the Commission charged with administering the Act, and section 22 of the Act in the aggregate indicate the implicit intent of Congress to create a private right of action.

With respect to the third *Cort* test, the Court of Appeals held that an implied right of action would be inconsistent with the purposes of the Act (Appendix A, pp. A21, A22) even though the court stated elsewhere that "... the overall purpose of the Natural Gas Act is to protect the interest of consumers in an adequate supply of gas at reasonable rates" (Appendix A, p. A15).

The court below surveyed the Commission's powers and decided that in this era of energy crises, the Commission should take responsibilty for problems associated with rates, certification and curtailment of service. *Id.* A majority of the court[9] then stated that private actions could disrupt the uniform regulatory scheme making the Commission's responsibilities under the act unmanageable. The Court is again commended to consider the attitude of the Commission. *Cf., Allen v. State Board of Elections, supra.* Obviously the Commission did not perceive this private action as a danger to its administration of national energy policy.

Thus, it is the position of PGW that its assertion of a private cause of action seeking damages for Gulf's violations of sections 7(b), (c) and (e) is not only in accordance with the purposes of the Act, but, in fact, represents the best method of implementing the Act's purposes.

9. Chief Judge Seitz did not join in this view (Appendix A, p. A22 n. 12).

Alternatively, this Court may decide that a private action may be maintained only in specified situations, to wit, an administrative determination that the Act has been violated.[10] Indeed, upon the facts in this case, the Commission found that Gulf violated section 7(c) of the Act.[11] *Cf., Gulf v. F.P.C, supra* (Comp. Case App. A, p. 32a). Thus, PGW argues alternatively that a private cause of action is to be implied in its favor against Gulf in view of the Commission's finding that there was a violation of the Act.

The court below also disclaimed judicial competence to afford the specific relief sought by PGW, allocating such remedial tasks to agencies of Congress. PGW concedes that the relief it seeks is unusual in that an appropriate portion of the relief received would be repaid to Gulf upon Gulf's future performance. While the relief sought may be in the nature of a performance bond, it is of no less importance to PGW. If PGW is not afforded the relief which it seeks, PGW may well be left with the inadequate remedy afforded by the Commission even if Gulf performs.

While PGW seeks specific relief, this relief would not give rise to *ad hoc* determinations infringing on the Commission's perogative. Clearly, any conflicts between private litigants and federal agencies are potential conflicts that exist whenever a private right of action is implied. Such potential for conflict exists because federal courts will no doubt consider facts and legal issues identical to those considered by the agency; consequently divergence is possible. However, issues which appear to be peculiarly appropriate for administrative resolution are not cause for a court eschewing a private right

10. In a case which preceded and presaged *Borak*, the SEC, although maintaining that a shareholder must first present his case to the Commission, submitted that he should be able to seek judicial assistance if in fact the SEC rejects his claim. Such position was accepted by the Court. *Phillips v. United Corp.*, 5 SEC Jud. Dec. 445, 455 Fed. Sec. L. Rep. (CCH) ¶90395, at 91069 (S.D.N.Y. July 30, 1947), *appeal dismissed sub nom. Phillips v. SEC*, 171 F.2d 180 (2d Cir. 1948).

11. In the companion case, the Commission, in Opinion No. 780-A, placed exclusive reliance on section 7(c) rather than section 7(b). On appeal, the Commission argued that Gulf also violated section 7(b), but consideration of this issue was refused by the Court of Appeals although the court implied that the argument would be attractive. *Gulf v. F.P.C.*, Comp. Case App. A, p. 31a n. 20.

of action. Rather, the court should refer those issues to the agency for initial determination, and then resolve the remaining issues, if any, as consistently as possible with the prior administrative determination. *See* O'Neil, ***Public Regulation and Private Rights of Action,*** 52 Cal. L.Rev. 231, 247, 248, n. 70 (1964). *See also* COMMENT, *Private Rights of Action Under Amtrak and Ash,* 123 U. Pa. L. Rev. 1392, 1435 (1975). Only if implying a private cause of action would necessarily conflict with the very purpose of the statute would implication be denied.

PGW does not seek to have federal courts supplant the Commission. PGW seeks, as the Commission recognizes, relief tailored to the actual damage PGW suffered upon Gulf's and Texas Eastern's unlawful failure to deliver natural gas. If this Court reverses the Court of Appeals in the companion case and denies certiorari in the instant case, PGW will be left without any effective remedy. Thus, the instant case and the companion case in the aggregate present the issue of whether there is to be adequate enforcement of the Natural Gas Act.

If the aim of the Act really is to protect consumers from excessive charges, *Federal Power Commission v. Interstate Gas Co.*, 336 U.S. 577, 581 (1949), and to protect consumers from exploitation at the hands of natural gas companies, *Federal Power Commission v. Louisiana Power & Light Co.*, 406 U.S. 621, 631 (1972), then a private right of action to ensure full recovery for injured consumers cannot be inconsistent with the purpose of the Act.

II. The Decision Below Is in Conflict With a Decision in Another Court of Appeals Which Implied a Private Cause of Action Under the Natural Gas Act, and Should Be Reviewed by This Court.

The Court of Appeals for the Eighth Circuit has held that there is to be implied a private cause of action in favor of a direct industrial consumer for violation by a natural gas company of section 7(b) of the Natural Gas Act. *Farmland Industries, Inc. v. Kansas-Nebraska Natural Gas Co., Inc.*, 486 F.2d 315 (8th Cir. 1973), *aff'g* 349 F.Supp. 670 (D. Neb. 1972). In the proceedings below, PGW asserted that Gulf had violated section 7(b) as well as 7(c) and 7(e) of the Act and that *Farmland* was persuasive precedent for implying private actions for each violation.

The court below held that *Farmland* was distinguishable on its facts and that it was not persuasive precedent since it preceded the quadripartite test in *Cort v. Ash.* The court decided that by virtue of *Polansky v. Trans World Airlines, Inc.*, 523 F.2d 332 (3rd Cir. 1975), each violation of a federal statute must be tested against the *Cort* standards and that each violated statutory section must meet the *Cort* standards. The court ruled that there had been no abandonment as in *Farmland*, and hence section 7(b); also, the court ruled that *Farmland* did not apply to sections 7(c) and (e).[12]

In holding that there was no abandonment within the meaning of *Farmland*, the Court of Appeals stated that in *Farmland*, abandonment was predicated upon the permanent cessation of all service at the expiration of the contract term without Commission approval (Appendix A, p. A20). The court did not adequately consider *Panhandle Eastern Pipeline Co. v. Michigan Consolidated Gas Co.*, 177 F.2d 942 (6th Cir. 1949) which held that a reduction in service constitutes a section 7(b) abandonment. Although *Farmland* did involve a permanent reduction in service, this does not preclude a holding that substantial (albeit temporary) reductions for extended periods of time are also section 7(b) abandonments. *Cf., Panhandle Eastern, supra.* Since section 7(b) was clearly intended to protect the consumer from non-approved discontinuity of service, such a result would not be unwarranted. *See Farmland,* 349 F. Supp. at 680.

The Eighth Circuit affirmed *Farmland* on the basis of the district court's finding that: (1) the plaintiff, a direct customer of defendant's was within the class intended to be protected by section 7(b); (2) private enforcement would further the congressional purpose of the Act; (3) the duty breached was created by the Act; (4) the violation affected the plaintiff

12. The Court also held that plaintiffs had failed to state facts implicating section 7(e) and had thus not stated a case for the violation of that section (Appendix A, p. A17, n. 7; continued from p. A16).

directly; and (5) no other remedy was available to guard adequately the right asserted. *Farmland*, 349 F. Supp. at 679. Thus, three of the four *Cort* criteria were considered, leaving only the issue of congressional intent not explicitly considered. PGW submits that the issue of intent, too, would have passed the *Cort* test by virtue of section 22 of the Natural Gas Act and *Borak, supra*. The court below, however, did not weigh these factors but implied that in any case, *Farmland* would not apply to violations of sections 7(c) and 7(e).

To the extent Gulf violated section 7(b) of the Act, the court's tacit conclusion is in conflict with the Eighth Circuit in *Farmland*. PGW asserts that *Farmland* was decided consistently with the *Cort* standards and that, in addition, *Farmland* is persuasive precedent for implying private causes of action under other subsections of section 7. Section 7(b) is *in pari materia* with sections 7(c) and (e) and hence *Farmland* is equally applicable to those provisions. The same result, that there is to be implied a private cause of action for violations of sections 7(c) and (e) should likewise follow.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

A. Grant Sprecher
Barton A. Hertzbach
Obermayer, Rebmann, Maxwell & Hippel
14th Floor Packard Building
Philadelphia, Pennsylvania 19102

Charles D. Ablard
Obermayer, Rebmann, Maxwell & Hippel
Suite 500
2011 I Street, N.W.
Washington, D.C. 20006
Attorneys for Petitioner, Philadelphia Gas Works

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 77-1661
77-1662

MILTON CLARK, FREDERICK W. ROST, ST. REGIS APARTMENTS, LTD., a California limited partnership; MELVIN BALSER, Managing Agent, *on behalf of themselves and all others similarly situated;* PHILADELPHIA GAS WORKS,
Plaintiff-Intervenor

v.

GULF OIL CORPORATION
and
TEXAS EASTERN TRANSMISSION CORPORATION

(D. C. Civil No. 76-2106)

THEODORE Q. THOMPSON and JAMESTOWN VILLAGE APARTMENTS, LTD., a California limited partnership; MELVIN BALSER, Managing Agent

v.

GULF OIL CORPORATION
PHILADELPHIA ELECTRIC COMPANY
TEXAS EASTERN TRANSMISSION CORPORATION

(D. C. Civil No. 76-2711)

PHILADELPHIA GAS WORKS, *Plaintiff-Intervenor, Appellant in No. 77-1661*
MILTON CLARK, et al., *Appellants in No. 77-1662*

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued September 9, 1977

Before SEITZ, *Chief Judge;* ALDISERT and ROSENN, *Circuit Judges*

Thomas E. Wiener, Esquire
Howard D. Scher, Esquire
GOODIS, GREENFIELD, HENRY & EDELSTEIN
1234 Market Street
Philadelphia, Pa. 19107
Attorneys for Appellants Milton Clark, et al.

A. Grant Sprecher, Esquire
Barry J. Hart, Esquire
Stephen Schachman, Esquire
OBERMAYER, REBMANN, MAXWELL & HIPPEL
14th Floor, Packard Building
Philadelphia, Pa. 19102
Attorneys for Philadelphia Gas Works

John L. McConn, Jr., Esquire
1100 Esperson Building
Houston, Texas 77002
James E. Farrell, Jr., Esquire
Gulf Oil Corporation
1 Presidential Boulevard
Bala-Cynwyd, Pa. 19004
Attorneys for Gulf Oil Corporation

M. Carton Dittman, Jr., Esquire
Oliver C. Biddle, Esquire
Lewis A. Grafman, Esquire
Linda S. Martin, Esquire
BALLARD, SPAHR, ANDREWS & INGERSOLL
United Engineers Building
20th Floor
30 South 17th Street
Philadelphia, Pa. 19103

Jack D. Head, Esquire
P.O. Box 2521
Houston, Texas 77001

James W. McCartney, Esquire
Judy M. Johnson, Esquire
Vinson & Elkins
2100 First City National Bank Bldg.
Houston, Texas 77002
Attorneys for Texas Eastern Transmission Corporation

OPINION OF THE COURT

(Filed December 30, 1977)

ROSENN, *Circuit Judge*

This appeal raises for the first time in this circuit the question of whether a private cause of action for damages against a producer of natural gas for failure to comply with a certificate of public convenience and necessity issued by the Federal Power Commission is implied under the Natural Gas Act, 15 U.S.C. §717 et seq., in favor of retail distributors and ultimate consumers of natural gas.

The appellants Clark, et al., filed a purported class action in the United States District Court for the Eastern District of Pennsylvania against Gulf Oil Corporation ("Gulf") and Texas Eastern Transmission Corporation ("Texas Eastern"). Plaintiffs request certification under Rule 23, Fed. R. Civ. P., to represent consumers of natural gas in the Philadelphia area, the area supplied by Philadelphia Gas Works ("PGW"), seeking damages, equitable relief, and costs. The appellants Theodore Q. Thompson, et al., alleging that they represent the users of natural gas supplied by Philadelphia Electric Company ("PECO"), filed a similar class action in the United States District Court for the Eastern District of Pennsylvania. The Clark and Thompson complaints contain three separate asserted causes of action: (1) an implied private cause of action purportedly arising under the Act; (2) a breach of contract action as third party beneficiaries under a gas purchase contract between Gulf and Texas Eastern, and (3) an action based on Gulf's and Texas Eastern's alleged conspiracy to withhold natural gas from the interstate mar-

ket. The district court consolidated the Clark and Thompson cases and PGW was granted leave to intervene.

The district court dismissed the complaint against Philadelphia Electric Company for lack of complete diversity of citizenship. As to the other defendants, the district court held that no private cause of action exists under the Natural Gas Act and on that basis it granted Gulf's motions to dismiss the complaint against it.[1] The district court, however, granted certification pursuant to 28 U.S.C. §1292(b) to permit plaintiffs and PGW to seek an interlocutory appeal on the issue of whether plaintiffs may pursue a private right of action against Gulf under the Natural Gas Act.[2] This court granted permission to appeal by order dated April 26, 1977. We find no merit in the limited issue before us and affirm the order of the district court.

I.

This appeal is a companion case to *Gulf Oil Corp. v. Federal Power Commission*, No. 76-2596 (3d Cir. September 7, 1977), in which the plaintiffs had intervened. In that case, we affirmed the order of the Federal Power Commission ("FPC") requiring Gulf to deliver to Texas Eastern greater quantities of gas than it had been delivering and ordering performance and refunds by Gulf. Because the detailed statement of the factual background underlying this proceeding is set forth in our opinion, *Gulf Oil Corp. v. FPC, supra*, a

1. In the context of a motion to dismiss under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted, we assume for the basis of our discussion that all facts pleaded by the plaintiffs are true. Cruz v. Beto, 405 U.S. 319, 322 (1972).

2. PGW asserts in its brief that Texas Eastern has violated sections 7(b), 7(c), and 7(e) of the Natural Gas Act. The purported violations arise from Texas Eastern's lack of due diligence in protecting its customers' statutory rights by failure to seek enforcement of Gulf's duty to deliver to Texas Eastern the statutorily mandated daily contract quantities of gas pursuant to its certificate of public convenience and necessity.

As to Texas Eastern, the class action appellants (plaintiffs) do not assert a cause of action against it arising out of the Natural Gas Act; the certification of the district court of the controlling question of law is limited to Gulf Oil Corporation.

skeletal statement should suffice for an understanding of the single issue raised in this appeal.

The intervenor, Philadelphia Gas Works, is a municipally owned gas distribution facility serving commercial, industrial, and residential users within the City of Philadelphia. For almost thirty years, it has been a customer of Texas Eastern, one of two such pipeline companies that supplies in excess of 97 percent of the natural gas consumed in Pennsylvania. The Clark plaintiffs are customers of PGW.

In 1963, Texas Eastern entered into a gas purchase contract with Gulf for the purchase of approximately 4.4 trillion cubic feet (Tcf) of gas to be supplied in minimum daily quantities. This contractual arrangement was approved under a certificate of public convenience and necessity issued by the FPC on December 19, 1963. *Gulf Oil Corp.*, 30 FPC 1559 (1963). Under the certificated contract, Gulf was to supply Texas Eastern with the gas over a 26 year period at a price not to exceed 21 cents per thousand cubic feet. Under the contract, as entered into subsequent to the issuance of the certificate and pursuant thereto, Gulf warranted itself to provide Texas Eastern a certain minimum amount of gas per day subject to Texas Eastern's demand for delivery of that amount. On November 7, 1975, the FPC issued an order directing both Texas Eastern and Gulf to show cause why they were not in violation of the certificate of public convenience and necessity issued in 1963. These appellants intervened in those proceedings and, after hearings, the Commission issued opinions No. 780 and 780-A which were the subject of review in this court at Gulf's behest in *Gulf Oil Corp. v. FPC, supra*. In the foregoing opinion, the FPC found, and we agreed, that under the certificate of public convenience, Gulf is obligated to deliver 625,000 Mcf (thousand cubic feet) of gas per day except when Texas Eastern demands less until the expiration of its contract to Texas Eastern.

In addition to ordering Gulf to comply prospectively, the FPC ordered Gulf to refund to Texas Eastern for flow through to the latter's customers a sum equal to the difference between Texas Eastern's request for gas and Gulf's deliveries multiplied by the difference between the contract price and the otherwise applicable area or national rates and interest.

The refunds were payable both for Gulf's past defaults and in the event of future defaults on its delivery obligations.[3] Because appellants herein claim that their cost of replacing Gulf's underdeliveries greatly exceeded the formula price devised by the FPC, they sought rehearing on the proper measure of damages. In its opinion 780-A issued December 9, 1976, the FPC noted that though the relief it afforded might not in fact fully compensate the distributors/customers for the damages they had incurred, it concluded that its formula was "an equitable estimate of damage to customers." In its opinion, however, the FPC did not limit those injured by Gulf's underdeliveries to the relief granted by the Commission. Instead, it stated that its order did not preclude customers and distributors served through Texas Eastern's system from seeking further compensation outside the Commission. Appellants turn to that statement of the Commission in their briefs and oral argument in this court as a partial basis for the monetary relief they seek in this proceeding.

II.

A threshold question we must first address is whether the district court had subject matter jurisdiction over this case.[4] Gulf contends that under *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667 (1950), there is no federal question juris-

3. Coupled with the refund provision is a recoupment order which permits Gulf, once it has "delivered an amount of gas equivalent to the contract amount less the amounts of gas for which it has paid refunds . . . to charge the contract price plus the amount of the refund previously paid on an equivalent amount of gas. . . . Over the entire contract, Gulf would have received exactly the contract price for all 4.4 Tcf, but it would, in effect, have been required to lose the time value of its money required to compensate its customers for their losses due to Gulf's nondelivery in accordance with the terms of the contract." Opinion No. 780-A *quoted in* Gulf Oil Corp. v. FPC, *supra*, slip opinion p. 28.

By coupling the recoupment provision to the refund order, the FPC made it clear that it did not consider the refund as equivalent of damages. In the view of the FPC, Gulf could not be ordered both to compensate the customers of Texas Eastern for their additional expenses *and* to deliver the full 4.4 Tcf required by its contract with Texas Eastern: the customers were not entitled to both damages and specific performance.

4. The district court did not reach the issue of whether there is federal question jurisdiction.

diction because the complaints show on their face that the plaintiffs' claims do not, in fact, arise under the Constitution, laws or treaties of the United States. Gulf asserts that because the basic allegations in the complaints charge the breach of the Gas Purchase Contract, for which the plaintiffs seek damages and equitable relief, the cause of action does not arise under federal law and so cannot be heard in the federal court absent diversity of citizenship. Gulf further asserts that plaintiffs add nothing to the complaint when they allege that the contract was "certificated" by the FPC and that by breaching the contract, Gulf also breached section 7 of the Natural Gas Act.

PGW responds to Gulf's argument by pointing out that Gulf's conduct is actionable under federal law as a breach of the certificate of public convenience and a violation of the Natural Gas Act. PGW asserts that although the same conduct by Gulf may be actionable under state law on a third party beneficiary breach of contract theory, its complaint does in fact allege a violation of federal law with resultant damages.

We do not believe that *Skelly Oil, supra,* supports Gulf's position. In that case, Skelly and other contracted with Phillips to sell it natural gas for resale to Michigan-Wisconsin Pipeline Co. ("Michigan-Wisconsin"). The contracts provided that the sellers would have the right to cancel the contracts in the event Michigan-Wisconsin failed to secure a certificate of public convenience from the FPC by October 1, 1946. The right of cancellation was to be exercised by written notice delivered to Phillips at any time after December 1, 1946, "but before the issuance of such certificate." On November 30, 1946, the Commission ordered the issuance of a certificate to Michigan-Wisconsin on certain stated terms and conditions. Although news of the Commission's action was released the same day, the actual content of its order was not made public until December 2, 1946. On that same day, the sellers gave notice of cancellation. Phillips and Michigan-Wisconsin then brought suit in the federal district court against the sellers for declaratory judgment because a certificate of public convenience had been issued "within the meaning of said natural gas act and said contracts" and that

the contracts were "still in effect and binding." A motion to dismiss the complaint for want of jurisdiction was denied, and the district court held the contracts to be binding. The Tenth Circuit affirmed. In reversing with directions to dismiss, the Supreme Court held that the action did not arise under the laws of the United States and that it should have been dismissed as to certain defendants because jurisdiction could not have been sustained as to them on grounds of diversity of citizenship. A reading of the case reveals that the plaintiffs' pleadings did not allege any violation of federal law but merely an anticipatory defense based on federal law. The Supreme Court concluded that would not do.[5]

In the instant case, however, the complaints aver an "action to recover damages and secure equitable relief for injuries [plaintiffs] have sustained as a direct result of violations by defendants of section 7 of the Natural Gas Act, 15 U.S.C. §717(f). . . ." Whether they are entitled to such relief is, of course, the question to be decided. But it is clear they have alleged injuries flowing from a violation of federal law which would give the district court subject matter jurisdiction. Under *Bell v. Hood,* 327 U.S. 678 (1946), *Hagans v. Lavine,* 415 U.S. 528 (1973), and *Gagliardi v. Flint,* F.2d (3d Cir. 1977), allegations in a complaint of a right to relief under federal law are sufficient to vest the district court with federal question jurisdiction unless the claim is wholly insubstantial and frivolous, or it is made solely for the purpose of obtaining jurisdiction and the alleged claim appears to be immaterial under the federal statute or constitution. *Bell v. Hood, supra,* at 681-682. In the instant case, the question whether there exists a private cause of action under the Natural Gas Act has not yet been decided and cannot be said to be insubstantial.

The other cases that Gulf cites to support its position are inapposite. In *Pan American Petroleum Corp. v. Superior*

5. The Supreme Court in *Skelly Oil, supra,* observed that "[t]o sanction suits for declaratory relief as within the jurisdiction of the District Courts merely because, as in this case, artful pleadings anticipate a defense based on federal law would contravene the whole trend of jurisdictional legislation by Congress, disregard the effective functioning of the federal judicial system and distort the limited procedural purposes of the Declaratory Judgment Act." 339 U.S. at 673-674.

Court, 366 U.S. 656 (1961), Cities Service Gas Company sued Texaco and Pan American in Delaware Superior Court to recover charges for natural gas in excess of the contracts between them. The overcharges had resulted from an order of the Kansas Gas Commission, later set aside by the United States Supreme Court. In its complaint, Cities Service proceeded on a breach of contract theory, but pleaded the Supreme Court's overturning of the Kansas order in anticipation of the expected defense by Texaco and Pan American that the higher rates were compelled by law. Texaco and Pan American moved for summary judgment in the Delaware court, the motion was denied, and the two defendants then petitioned the Delaware Supreme Court for a writ of prohibition against further proceedings in the Superior Court. Their theory was that the Natural Gas Act had deprived state courts of jurisdiction over the subject matter of the cases. The Delaware Supreme Court sustained the jurisdiction of the Superior Court and defendants appeal to the United States Supreme Court. The Supreme Court affirmed.

Even though the Natural Gas Act vests the federal courts with exclusive jurisdiction over suits arising under the Act, the Supreme Court explained, the question whether a particular suit falls within this grant of exclusive jurisdiction depends on the pleadings. Holding that the complaints in the Delaware Superior Court determine the nature of the suit before it, the Supreme Court declared that the rights asserted by the plaintiff are traditional common law claims and they do not lose their character "because it is common knowledge that there exists a scheme of federal regulation of interstate transmission of natural gas." *Id.* at 663.

Gulf cites *Pan American Corp. v. Superior Court* for the proposition that the present plaintiffs cannot make this a federal case by characterizing what are nothing but common law claims as claims under the Natural Gas Act. The case, of course, does not support this proposition: as the Court said, "the party who brings a suit is master to decide what law he will rely upon," 366 U.S. at 662, *quoting The Fair v. Kohler Die and Specialty Co.,* 228 U.S. 22, 25 (1913), and the plaintiffs in this suit have clearly chosen to rely on federal law.

Gulf supports its contention that the allegation of breach of certificate and violation of the Natural Gas Act add nothing to what is in reality a breach of contract action by citing *Saturn Oil & Gas Co. v. Northern Natural Gas Co.*, 359 F.2d 297 (8th Cir. 1966). The case grew out of the same situation as *Pan American, supra.* A gas producer charged a gas distributor rates in excess of the contract between them under compulsion of an order by the Kansas Gas Commission. After the Supreme Court set aside the Commission's order, the distributor brought an action against the producer for a refund of the overcharges. The entire discussion on which Gulf now relies is as follows:

> The rights of the parties hereto are based upon the contract. It is well settled that the type of action here involved is not barred or superseded by the provisions of the Federal Natural Gas Act. *See* Pan American Petroleum Corp. v. Superior Court of Delaware, 366 U.S. 655. . . .

For the same reasons that *Pan American* itself is irrelevant to this case, *Saturn Oil* is also. It simply does not speak to the question whether there is federal jurisdiction over an action based upon the Natural Gas Act.

We are not persuaded that the appellants' cause, of first impression in this court, is insubstantial or frivolous; the complaints raise serious questions under the Natural Gas Act which the district court could have decided only after it assumed jurisdiction over the controversy. We therefore hold that the district court had federal subject matter jurisdiction of the case.

III.

In light of the district court's proper assertion of subject matter jurisdiction, it remains for us to determine whether the district court's holding that there is no implied private cause of action under the Natural Gas Act against Gulf is correct. Plaintiffs' complaints in substance allege that Gulf and Texas Eastern intended that the 1963 Gas Purchase Contract between them be for the benefit of the distributor/customers of Texas Eastern and that plaintiffs are such customers. The contract was "certificated" by the Federal Power Commission and a certificate of public convenience was issued to, and accepted by, Texas Eastern. Beginning sometime in 1971, Gulf failed on an intermittent basis to meet its delivery obligations to Texas Eastern as required under the certificated Gulf contract and as demanded by Texas Eastern. Beginning in 1973 Gulf began regular underdeliveries to Texas Eastern of quantities demanded by Texas Eastern under the contract, and the deficits have continued to the present. As a result of the shortfall, PGW has been required to purchase additional supplies of natural gas on a short-term basis directly from other suppliers, and make other supplementations which have resulted in much higher cost to PGW and its customers and which all of the plaintiffs claim have caused them damages.

On appeal to this court, plaintiffs argue that Gulf has violated sections 7(b), (c) and (e) of the Natural Gas Act.

In determining whether a private right of action is implicit in a statute not expressly providing one, Mr. Justice Brennan, writing for the Supreme Court in *Cort v. Ash*, 422 U.S. 66 (1975), indicated that at least the following factors are relevant: First, is the plaintiff one of the class for whose especial benefit the statute was enacted? Second, is there any indication of legislative intent, either to create a private cause of action or to deny one? Third, is the implication for a private remedy consistent with the underlying purpose of the legislative scheme? Fourth, is the cause of action traditionally relegated to state law, thereby rendering it inappropriate to infer a cause of action solely on federal law? *Id.* at 78.

The district court held that implying a private right of action for damages under the Natural Gas Act would not meet three of the four factors established by *Cort*. The district court did not address the first standard of whether plaintiffs fell within the class for whose especial benefit the statute was enacted, concluding that even if they were, this would not be sufficient to overcome their failure to meet the other three *Cort* tests. The district court noted that under the congressional regulatory scheme established for the natural gas indus-

try, the FPC may obtain enforcement of its decision in the district court and may develop remedies that enhance the statutory objectives. It also expressed concern that a jury trial de novo in the district court could possibly result in a verdict inconsistent with the FPC's findings in the administrative proceedings which would inevitably lead to "chaos, confusion, and duplication [of] the regulatory scheme." The district court recognized that Congress had provided for review of decisions and orders of the FPC by courts of appeals to which district courts must defer; that the district court's role would necessarily be subordinated to providing remedies in addition to those fashioned by the FPC; and that the FPC was in a more strategic position to fashion remedies to implement the regulatory scheme and carry out its objectives, including the ordering of rate adjustments, refunds, or making declaratory orders. The court also concluded that legal problems relating to natural gas shortages do not lend themselves to piecemeal solutions by separate district court decisions. In sum, then, the district court's analysis of *Cort* revealed no implied private right of action under the Natural Gas Act.

Before we commence our analysis of plaintiff's implied cause of action claim, we must first ascertain precisely what relief it is they seek. Although it is not clear from the complaint or throughout most of its brief what relief PGW seeks, PGW does at one point state:

> What PGW seeks . . . is immediate monetary relief to cover fully the costs PGW incurred in securing replacement gas over and above the limited monetary relief afforded by the FPC. As with the monetary relief secured from the FPC, PGW concedes the necessity of restoring such amounts to Gulf based on the timetable set forth by the FPC in opinion No. 780.

At oral argument before us, counsel for the Clark group expressly stated that his plaintiffs sought identical relief. It appears, therefore, that plaintiffs' proposed right of action seeks no more than to supplement the refunds already awarded by the FPC, an award we have recently affirmed.

Our initial inquiry, under the *Cort* test, is whether plaintiffs are among the class for whose especial benefit the statute

was enacted? We believe the overall purpose of the Natural Gas Act is to protect the interest of consumers in an adequate supply of gas and at reasonable rates. The Supreme Court stated the primary aim of the Act in more colorful terms—the protection of consumer interests against exploitation at the hands of natural gas companies. *FPC v. Louisiana Power & Light Co.*, 406 U.S. 621, 631 (1972); *FPC v. Hope Gas Co.*, 320 U.S. 591, 610 (1944). "The aim of the Act was to protect ultimate consumers of natural gas from excessive charges." *FPC v. Interstate Gas Co.*, 336 U.S. 577, 581 (1949). This does not end the matter, however, because even though plaintiffs may be among the class for whose especial benefit the statute was enacted, it does not necessarily follow that they have an implied cause of action for damages under the Act.

We therefore turn to the second factor of *Cort* and inquire whether there is any indication of legislative intent, explicit, or implicit, to imply a private remedy in the Act or to deny one. Plaintiffs' contention that there is an implied private right of action draws heavily on *J. I. Case Co. v. Borak*, 377 U.S. 426 (1964). In that case, a stockholder of the J. I. Case Co. brought a suit in the federal court for deprivation of his preemptive rights in J. I. Case Co. by reason of a merger between Case and the American Tractor Corporation in violation, *inter alia*, of section 14(a) of the Securities Exchange Act of 1934, 15 U.S.C. §78n(a). The plaintiff in *Borak* relied substantially on section 27 of the 1934 Act, 15 U.S.C. §78AA, which gives the district courts exclusive jurisdiction of all suits in equity and actions at law brought to enforce any liability or duty created thereunder.

PGW, in the instant case, compares similar language in section 27 of the Securities Exchange Act to section 22 of the Natural Gas Act and concludes, citing *Borak*, that the grant of jurisdiction in the Natural Gas Act should be read as evidence of congressional intent to create a private right of action for violations of the Act.[6]

6. Comparable language in section 22 of the Natural Gas Act, 15 U.S.C. §717a, reads as follows:

> The district court of the United States . . . shall have exclusive jurisdiction of violations of this chapter, or the rules, regulations

In *Piper v. Chris Craft Industries, Inc.*, 430 U.S. 1 (1977), the Supreme Court refused to imply a remedy under the same 1934 act that figured in *Borak* notwithstanding the continued existence of the section 27 grant of jurisdiction. The Court adverted to the reasoning of *Borak* that "where congressional purposes are likely to be undermined absent private enforcement, private remedies may be implied in favor of the particular class intended to be protected by the statute." *Id.* at 25. The Court emphasized that *Borak* had implied a remedy "because of practical limitations upon the SEC's enforcement capabilities" that made " '[p]rivate enforcement . . . *a necessary supplement to Commission action.*' " *Id., quoting J. I. Case v. Borak,* 377 U.S. at 432 (emphasis supplied by *Piper* opinion). *See Blue Chip Stamps v. Manor Drug Stores,* 421 U.S. 723, 730 (1975).

It is apparent, then, that a general grant of jurisdiction such as that provided by section 22 of the Natural Gas Act is not conclusive evidence of a congressional intent to provide a private remedy. The language of section 22 of the Natural Gas Act makes good sense because other sections of the Act provide for action and litigation in the district court, making section 22 operative without necessarily implying a private right of action for damages. The grant of jurisdiction in the district courts need not be read as extending beyond those causes of action expressly provided for elsewhere in the Act. It does not apply necessarily to causes of action which are not provided for in the statute. We must therefore examine the congressional scheme under the Natural Gas Act to determine whether a private cause of action is necessary to effectuate the policy and purpose of that scheme.

Sections 7(b), (c), and (e) of the Natural Gas Act make no express provision whatsoever for a private cause of action.[7]

Note 6—*Continued*

and orders thereunder and of all suits in equity or actions at law brought to enforce any liability or duty created by or to enjoin any violation of this chapter or any rule, regulation, or order thereunder.

7. Section 7(b), 15 U.S.C. §717f(b) (1970), provides in pertinent part:

No natural gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission. . . .

Section 7(c), 15 U.S.C. §717f(c) (1970), provides in pertinent part: No natural-gas company . . . shall engage in the . . . sale of natural gas, subject to the jurisdiction of the Commission . . . unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations.

Section 7(e), 15 U.S.C. §717(e) (1970), provides in pertinent part:

[A] certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale [or] service . . . covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed . . . and that the proposed service, sale, or operation . . . to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; . . .

Although plaintiffs conclusionally allege also a violation of section 7(e), they state no facts implicating this section and we hold that plaintiffs have not stated a case in violation of this section of the Act.

Section 7(b) is designed to give the FPC control over the abandonment of facilities or service subject to its jurisdiction. Section 7(c) prohibits a natural gas company subject to the Court's jurisdiction from engaging in the transportation or sale of natural gas unless such company has in force a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations. Both sections are absolutely barren of any explicit expression or of any implied indication that a private right of action for damages is contemplated for a violation of the Act. Nor is there any express provision that denies a private cause of action for a violation. These sections, however, are typical provisions in the regulatory scheme of public utilities.[8] The statutory requirement in section 7(b) that there first be a determination that the supply of gas is depleted and that a further continuance of service is unwarranted before abandonment is intended to insure the availability of a necessary energy resource. It is the Commission's task to facilitate and maintain that availability. The requirement in section 7(c) is intended to prevent wasteful competition in the sale and distribution

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8. There are similar provisions in the Interstate Commerce Act (49 U.S.C. §1 (18-20), the Communications Act of 1934 (47 U.S.C. §214) and the Motor Carrier Act (49 U.S.C. §§304, 306, 307, 308).

of an important natural resource.[9] Therefore, the Commission is expressly charged with the duty and responsibility of determining whether the proposed service is or will be necessary and whether it "will be required by the present or future public convenience." 15 U.S.C. §717f(e) (1970). This provides the Commission with the machinery to curb unnecessary and wasteful competition and to examine the adequacy of the proposed service. Thus, its primary purpose is to regulate competition among natural gas companies and prohibit anyone from competing until after the Commission has determined whether the proposed operation is necessary, whether it will serve the public convenience and whether the applicant can render an adequate service at fair and reasonable rates.

Furthermore, the Commission is charged under the Act with the power of oversight and regulation: It carries the responsibility for determining whether rates to be charged are fair and reasonable and whether the proposed service to localities and persons and the proposed classes of service are impartial and non-discriminatory. 15 U.S.C. §717(c) (1970). The Commission has the power after conducting a hearing to grant certificates of public convenience and necessity, to fix just and reasonable rates and practices, and to order a decrease in rates when they are unjust, preferential, unduly discriminatory, otherwise unlawful, or are not the lowest reasonable rates, 15 U.S.C. §717(d) (1970). It may also permit abandonment of facilities or services. The Commission is empowered to prescribe a system of accounts to be kept by such natural gas companies and to classify such accounts. 15 U.S.C. §717g(b) and (c) (1970).

Finally, the enforcement provisions of the Act give the Commission broad administrative powers, the power to prescribe and issue orders and regulations, and to bring actions to enforce the public interest whenever there are violations of the Act. 15 U.S.C. §717(o) (1970). The Commission has

9. The hearing before the House Committee on Interstate Foreign Commerce discloses:

> It was the express intention of Congress in enacting the existing certification section of the Natural Gas Act to prevent wasteful competition of natural gas companies. H.R. Rep. #1290, 77th Cong. 1st Sess. 19411.

extensive powers to investigate complaints or violations, including complaints of any state, municipality, or State commission, to conduct hearings, compel attendance of witnesses and production of records from any place in the United States or to order testimony by deposition. 15 U.S.C. §717m. When it appears to the Commission that any person is engaged in or is about to engage in activity which may violate the Act or any rule, regulation, or order thereunder, the Commission may bring an action to enjoin the same in any United States District Court. 15 U.S.C. §717s(a).

In view of Congress' evident intent to create a comprehensive and effective regulatory scheme for the transportation and sale of natural gas in interstate commerce, built upon a carefully conceived and structured system for enforcement of the Act's provisions, we conclude that Congress did not contemplate a private cause of action for damages by retail customers whenever a regulated natural gas company breached its certificate of public convenience and necessity under the Natural Gas Act.

Plaintiffs contend, citing as compelling authority *Farmland Indus., Inc. v. Kansas-Nebraska Natural Gas Co., Inc.*, 486 F.2d 315 (8th Cir. 1973), that Gulf's underdeliveries to Texas Eastern of the demanded quantities under the contract constitute the basis for an implied right of action under section 7(b).[10] We disagree. In *Farmland*, the Eighth Circuit affirmed a district court opinion which held that there was an implied private right of action in favor of a direct industrial consumer against a natural gas company that violated section 7(b) by terminating gas supply service, through facilities constructed under a certificate of necessity and convenience, without prior FPC approval. Significantly, *Farmland* precedes the quadripartite test in *Cort v. Ash, supra*, to determine the existence of an implied private right of action, as

10. PGW concedes in its brief in this court that the FPC did not consider in its opinion 780 whether Gulf's underdeliveries of the daily contract quantities constituted a *de facto* abandonment within the meaning of section 7(b) of the Act, 15 U.S.C. §717f(b). "In opinion 780-A, the Commission placed exclusive reliance on section 7(c), even after section 7(b) was brought to its attention on the issue of refunds." Gulf Oil Co. v. FPC, *supra*, slip op. 29. n.20.

well as our later decision in *Polanski v. Trans World Airlines, Inc.*, 523 F.2d 332 (3d Cir. 1975). In *Polanski*, we expressed the view that each incident alleged in connection with violations of section 1374(b) of the Federal Aviation Act,[11] specifically prohibiting discrimination by any regulated carrier, must be tested against the standards stated by the Supreme Court in *Cort*. Therefore, no implied private right of action for damages can be found here unless the violated statutory sections meet the *Cort* standards. Second, the opinion of the district court in *Farmland* plainly discloses that the utility, unlike Gulf in the instant case, had *permanently* ceased delivery of all gas at the expiration of their gas purchase contract. Thus, the finding of abandonment was predicated upon the *permanent* cessation of all service at the expiration of the contract term without Commission approval. *Farmland Indus. v. Kansas-Nebraska Natural Gas Co., Inc.*, 349 F. Supp. 670, 676 (D. Neb. 1972).

We believe our conclusion that no private cause of action is implied is further supported by *Montana-Dakota Util. Co. v. Northwest Pub. Serv. Co.*, 341 U.S. 246 (1951). In that case the plaintiff electric company sued in federal district court to recover losses suffered as a result of allegedly fraudulent and unlawful rates charged by the defendant public utility company as a result of a prior interlocking directorate in which the defendant was involved. Both companies were subject to the Federal Power Act. Like section 4 of the Natural Gas Act, section 205(a) of the Federal Power Act requires that rates and charges be just and reasonable and those that were not were "declared to be unlawful." Jurisdiction in the United States district court was asserted under section 317 of the Federal Power Act, comparable to section 22 of the Natural Gas Act. The Supreme Court, however, refused to imply a private cause of action for violation of the Power Act, holding that the right to a reasonable rate is the right to the rate which the Commission fixes, and that "except for review of the Commission's orders, the courts can assume no right to a different one on the ground that, in its opinion, it is the only or the more reasonable one." *Id.* at 252. In the instant

11. 49 U.S.C. §1374(b) (1970).

case, the FPC has the power, the flexibility, and resourcefulness to compel compliance with the certificate and to fashion and implement appropriate remedies for the shortfall in Gulf's deliveries and we perceive nothing in the congressional scheme to imply a private cause of action for damages for a violation of the Gas Act.

The foregoing analysis of the Natural Gas Act should also be sufficient response to the third factor in *Cort v. Ash*, whether it is consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiffs. We believe it is not. Congress has delegated under its comprehensive scheme extensive regulatory powers to the Commission in an essential and monopolistic industry to grant certificates of public convenience when the public welfare dictates and the authority to effectuate compliance with such a certification. The Commission has the authority to establish rules and standards in making such determinations; it has exclusive jurisdiction to determine whether the proposed service will adequately serve the public interest and whether a rate meets the "just and reasonable" standard of the Act, 15 U.S.C. §717c (1970), *Northern Natural Gas Co. v. Kansas Comm'n*, 372 U.S. 84, 89 (1963); and Congress has granted the Commission "*rate-setting* authority . . . over all interstate sales for resale." *FPC v. Louisiana Power & Light Co.*, 406 U.S. 621, 639 (1972). Curtailment of deliveries in this foreboding era of energy crises, including natural gas shortages, fall peculiarly within the FPC's responsibilities under the head of its "transportation" jurisdiction. "The Commission must possess broad powers to devise effective means to meet these responsibilities." *Id.* at 642. *Accord, Reynolds Metals Co. v. FPC*, 534 F.2d 379, 384 (D.C. Cir. 1976).

There are thousands of contracts between gas transmission companies and their suppliers, each of which must be certified by the Commission under section 7 of the Act. There are thousands of contracts between pipeline companies and their distributors also certificated by the Commission. If each of them, as well as the many millions of ultimate consumers thereby affected, could bring a private cause of action for an alleged violation of a certificate of public convenience, an industry essential to the health and welfare of the nation

could conceivably be litigated to exhaustion. The uniform regulatory scheme devised by Congress could be disrupted, seriously disabled, and possibly destroyed. Conflicting decisions among the courts and between the courts and the Commission concerning duties and liabilities would be inevitable and the responsibilities of the Commission under the Act unmanageable.[12] We therefore conclude that it is not consistent with the underlying purpose of the regulatory scheme to imply a private remedy in damages for a breach of the Act.

The conclusion we reach is especially applicable to the instant case because of the limited nature of the relief sought by plaintiffs. Although plaintiffs seek immediate monetary relief, the money sought is not in the traditional form of outright damages, but money which must eventually be restored to Gulf in accordance with the timetable prescribed by the FPC when the gas contracted for is delivered. The computation of the amount of the relief required, the machinery for recoupment and ordering a resetting of the rates to accomplish the same, in our view, are not within the competence and powers of the courts. Even if they were, such tasks are best left to the expertise, organization, and enforcement machinery created by Congress. The national purpose, powers, and structure of the FPC negate the claim that the ultimate consumers of gas "were intended to have additional weapons in the form of an implied cause of action for damages," *Piper v. Chris-Craft Indus., Inc., supra* at 38, particularly when, as here, the money sought must eventually be returned. As we have previously indicated, the money to be paid by Gulf under our decision is "nothing more than a temporary performance bond made necessary by Gulf's failure to fulfill the terms of its certificate," *Gulf Oil Corp. v. FPC, supra,* slip op. at 35. Under these conditions, an implied cause of action for damages does not add significant additional protection for ultimate consumers of gas but might well disrupt the congressional scheme devised for the regulation of an essential industry and the protection of the public generally.

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12. While Chief Judge Seitz fully supports the opinion of the court, he does not join in this paragraph. He believes the views expressed therein are unnecessary to the determination of this case and fears they are, at least in part, of questionable soundness.

For reasons stated in the preceding paragraph we need not dwell long on the fourth factor in the *Cort* analysis, whether the cause of action is one traditionally relegated to state law. Because the fundament of Gulf's certificate of public convenience is the Gas Purchase Contract between Gulf and Texas Eastern, the claims plaintiffs advance as third-party beneficiaries for breach of contract are "traditionally relegated" to state courts. As we have pointed out, however, the remedy which plaintiffs seek is not typical money damages. Rather, they seek an unusual, limited money relief which they must ultimately return to Gulf upon the future delivery of the shortfall in accordance with the timetable fixed by the Commission in its opinion No. 780. Under such circumstances, the fourth factor in *Cort* has little relevance to the instant case.

V.

We find no merit in the arguments advanced by plaintiffs for an implied private right of action for damages for a violation of the Natural Gas Act. Accordingly, the judgment of the district court will be affirmed.

APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 77-1661
77-1662

MILTON CLARK, FREDERICK W. ROST, ST. REGIS APARTMENTS, LTD., a California limited partnership; MELVIN BALSER, Managing Agent, *on behalf of themselves and all others similarly situated*; PHILADELPHIA GAS WORKS,

Plaintiff-Intervenor

v.

GULF OIL CORPORATION
and
TEXAS EASTERN TRANSMISSION CORPORATION
(D. C. Civil No. 76-2106)
THEODORE Q. THOMPSON and JAMESTOWN VILLAGE APARTMENTS, LTD., a California limited partnership; MELVIN BALSER, Managing Agent

v.

GULF OIL CORPORATION
PHILADELPHIA ELECTRIC COMPANY
TEXAS EASTERN TRANSMISSION CORPORATION
(D. C. Civil No. 76-2711)
PHILADELPHIA GAS WORKS, *Plaintiff-Intervenor, Appellant in No. 77-1661*
MILTON CLARK, et al., *Appellants in No. 77-1662*

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: SEITZ, *Chief Judge* and ALDISERT and ROSENN, *Circuit Judges*

JUDGMENT

These causes came on to be heard on the records from the United States District Court for the Eastern District of Pennsylvania and were argued by counsel on September 9, 1977.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered March 30, 1977, be, and the same is hereby affirmed. Costs taxed against appellants.

Attest:

M. Elizabeth Ferguson
Chief Deputy Clerk

December 30, 1977

APPENDIX C

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MILTON CLARK, *et al.*
v.
GULF OIL CORPORATION, *et al.*
Civil Action No. 76-2106

THEODORE Q. THOMPSON, *et al.*
v.
GULF OIL CORPORATION, *et al.*
Civil Action No. 76-2711

MEMORANDUM AND ORDER

CAHN, J. March 29, 1977

In both of the cases before the court there are a series of preliminary motions most of which are ripe for decision. These cases are related to the natural gas shortage and involve an alleged failure by Gulf Oil Corporation ("Gulf") to fulfill a contract to provide minimum quantities of natural gas to Texas Eastern Transmission Company ("Texas Eastern"). Texas Eastern delivers natural gas by pipeline to Philadelphia Gas Works ("PGW") and Philadelphia Electric Company ("PECO"), who in turn distribute the gas to the consumer. In the *Clark* case[1] the plaintiffs, as users of natural gas supplied to them by PGW, seek damages, equitable relief, attorneys' fees and costs against Gulf and Texas Eastern. In the *Thompson* case[2] the plaintiffs, as users of natural gas supplied by PECO, seek similar relief from Gulf and Texas Eastern. The *Thompson* plaintiffs also named PECO as a defendant contending that PECO violated its fiduciary duty to protect its customers by not taking affirmative action against Gulf and Texas Eastern. In both cases, the complaints contain class action allegations[3] whereby the plaintiffs request

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1. The case of Milton Clark, et al. v. Gulf Oil Corporation, et al., Civil Action No. 76-2106, will be referred to as the Clark case.

2. The case of Theodore Q. Thompson, et al. v. Gulf Oil Corporation, et al., Civil Action No. 76-2711, will be referred to as the Thompson case.

3. There is no motion for class action certification presently before the court.

certification under Fed. R. Civ. P. 23 authorizing them to represent the consumers of natural gas in the Philadelphia area.

Oral argument was held on all outstanding motions on December 17, 1976. At that time, the motions of the plaintiffs to consolidate both cases were granted. Also, PGW's petition to intervene in the *Clark* case was granted, but its request to file an amended complaint was denied. Before dealing with the other outstanding motions, it is necessary to set forth the factual background of this litigation.

FACTUAL BACKGROUND OF LITIGATION

Texas Eastern is a major supplier, through its interstate pipelines, of the natural gas consumed in the City and County of Philadelphia. In order to obtain gas for transmission through its pipelines, Texas Eastern in 1963 entered into contractual arrangements requiring Gulf to supply daily minimum quantities of natural gas. On December 19, 1963, these contractual arrangements were approved and certified by the Federal Power Commission ("FPC") pursuant to the Natural Gas Act, 15 U.S.C. §717f. The FPC approved the purchase by Texas Eastern from Gulf of approximately 4.4 trillion cubic feet of gas over a twenty-six year period at a price not to exceed twenty-one cents per Mcf.[4] Gulf and Texas Eastern entered into a formal warranty contract on January 6, 1964, incorporating the foregoing terms. The contract set forth daily minimum and maximum delivery quantities.

Following 1964, Gulf did not supply to Texas Eastern the daily minimum quantities of natural gas required by the contract. As a result, on November 7, 1975, the FPC directed Gulf and Texas Eastern to show cause why they were not in violation of the certificate of public convenience issued December 19, 1963. Both PGW and customers of PGW were permitted to intervene in the FPC proceedings. PECO did not intervene. On August 13, 1976, an administrative law judge issued an initial decision requiring Gulf, within a short period of time, to comply with its certificate obligations. The administrative law judge also recommended that the FPC forward its files on this matter to the Justice Department pursuant to

4. "Mcf" is one thousand cubic feet of gas.

15 U.S.C. §717s(a) for investigation of possible criminal antitrust violations.[5] Exceptions were filed to this decision.

Thereafter, the FPC on October 15, 1976, issued Opinion No. 780 and an accompanying order in which the FPC found that Gulf failed to fulfill its delivery responsibilities to Texas Eastern under the certificate of public convenience issued December 19, 1963, and under the warranty contract dated January 6, 1964. The FPC further ordered that Gulf compute and pay refunds to Texas Eastern calculated on the volume of underdelivery multiplied by the difference between the area or national rate applicable to new gas purchases at the time of underdelivery and the contract price. These refunds are to be flowed through to Texas Eastern's jurisdictional customers. Provision was made for Gulf to recoup the refunds after it complied with its responsibility to supply the contracted-for quantities of gas. Apparently, the measure of damages imposed by the FPC against Gulf represents the loss of the interest on the amount of the refunds until recoupment. By fashioning relief in this manner, the FPC intended that Gulf would be required to supply the 4.4 trillion cubic feet of gas at a price not to exceed twenty-one cents per Mcf. If money damages for breach had been part of the relief ordered by the FPC, then Gulf could have taken the position that its contractual obligations were terminated upon the payment of the damages. The intent of the FPC was to require Gulf to deliver the natural gas to Texas Eastern at the earliest possible time.

The order of the FPC in regard to refunds is as follows:

> (B) On December 15, 1976, Gulf shall file a computation of refunds to Texas Eastern, and serve it on all parties to this proceeding subject to the approval of the Commission and in accordance with the following formula. The refund shall be measured by the difference between Texas Eastern's requests for gas, but not more than the contract maximum amount, and actual deliveries from November 1, 1964, until December 1, 1976, times

5. Gulf moved to strike reference in the pleadings and briefs of the plaintiffs to this recommendation of the administrative law judge. However, at this stage of the proceedings the alleged data, although received on information and belief, is sufficient to justify the reference objected to in the pleadings and in the briefs.

the difference between the applicable area or national rate and the applicable contract price. Damages would be assessed for each month deliveries fell below the amount demanded by Texas Eastern, if within the contract maximum, excepting volumes attributable to *force majeure*. Gulf shall make the required refund to Texas Eastern within 30 days of Commission approval of Gulf's computation of refund. The refunds shall carry 7% interest to October 10, 1974, 9% thereafter.

(C) If in any month subsequent to the refund required in Paragraph (B) above Gulf fails to deliver the amount of gas required by the contract, it shall within 30 days make further refund to Texas Eastern in accordance with the above formula.

(D) When there remains to be delivered under Gulf's contract with Texas Eastern that amount of gas for which refund has been made, Gulf may file a rate change so that the price to Texas Eastern for appropriate volumes shall be the contract price plus the amount of the refund previously paid applicable to the same volumes.

(E) Within 120 days of the date of the final order in this proceeding, Texas Eastern shall submit a plan for the flow-through of the refunds herein ordered to be disbursed indicating the amount payable to each jurisdictional customer, the basis used to compute the amount payable, and the periods involved. Before doing so, Texas Eastern shall survey its customers and affected state regulatory commissions to determine an equitable division of the refund amount based on the costs to each customer of failing to receive the gas undelivered by Gulf. Copies of the flow-through plan shall be served on each of the parties to this proceeding, Texas Eastern's jurisdictional customers, and upon affected state regulatory commissions. Within 30 days of approval of Texas Eastern's plan, providing the refund has been received from Gulf, Texas Eastern shall proceed with the distribution of refunds to its jurisdictional customers. In case of any subsequent monthly refunds as provided in Paragraph (C) above, Texas Eastern shall prepare and file similar

allocation plans with the Commission and serve them on its customers and the state commissions within 30 days of receiving an additional refund.

In its Opinion No. 780 the FPC gave the following illustration:

A hypothetical example may clarify our decision. Assume it were found that before Gulf resumed satisfaction of its contract obligations it had defaulted in the following amounts:

* 1/ 1/76– 6/21/76	90 Bcf	at 7¢	[26¢-19¢]/Mcf	=	$ 6.3 million
6/21/74–12/ 4/74	40 Bcf	at 23¢	[42¢-19¢]/Mcf	=	$ 9.2 million
12/ 5/74– 7/26/76	150 Bcf	at 33¢	[52¢-19¢]/Mcf	=	$49.5 million
7/27/76–12/ 1/76	20 Bcf	at $1.23	[$1.42-19¢]/Mcf	=	$24.6 million

Then Gulf would be required to refund immediately plus appropriate interest, $89.6 million. Then, when it had delivered all but 300 Bcf of the contract amount, it would be permitted to recoup its refunds by adding a surcharge of 7¢/Mcf to the next 90 Bcf sold, 23¢/Mcf to the next 40 Bcf, etc., until the entire contract was fulfilled, and the entire refund recouped.

Over the entire contract, Gulf would have received exactly the contract price for all 4.4 Tcf, but it would, in effect, have been required to lose the time value of its money required to compensate its customers for their losses due to Gulf's non-delivery in accordance with the terms of the contract.

Various parties sought rehearing, and on December 9, 1976, the FPC entered an "Opinion and Order denying rehearing in part" entitled Opinion No. 780-A. The order of the FPC at Opinion No. 780-A is as follows:

(A) The applications for rehearing filed by Gulf, Texas Eastern, Brooklyn Union, New York and New England are denied except as provided below. PGW's request for clarification in its motion and application for rehearing is granted as provided below.

(B) Ordering Clause (D) in Opinion No. 780 is modified to provide that when Gulf delivers gas to Texas

*The year "1976" on this line of the hypothetical example is apparently a typographical error in Opinion 780.

Eastern in an amount greater than 625 MMcf in any one day at Texas Eastern's request, the price shall be the contract price plus a recoupment of an amount of refund previously paid on an equivalent volume of gas, as agreed between Gulf and Texas Eastern.

(C) The refund required in Opinion No. 780 and in Ordering Paragraph (B) and flowed through to Texas Eastern's customers by Ordering Paragraph (E) does not preclude any of the customers and distributors served through Texas Eastern's system from seeking further compensation outside the Commission in mitigation of damages allegedly not compensated by the Commission's action herein.

An appeal from the Opinions and Orders of the FPC has been taken to the Third Circuit Court of Appeals. On December 22, 1976, that court, on motion of Gulf granted a stay of the FPC's Orders and Opinions.

I will now consider the following motions: PECO's motion to dismiss it as a defendant in the *Thompson* case; Texas Eastern's motions to dismiss it as a defendant in the *Clark* and *Thompson* cases; Gulf's motions to dismiss it as a defendant in the *Clark* and *Thompson* cases; and PGW's motion to disqualify counsel for plaintiffs in the *Clark* case.

PECO'S MOTION TO DISMISS

PECO is a defendant in the *Thompson* case. There is no diversity of citizenship between the *Thompson* plaintiffs and PECO because some of the Thompson *plaintiffs* are citizens of the Commonwealth of Pennsylvania and PECO is a corporation organized and existing under Pennsylvania law, with its principal office in Pennsylvania. The theory of the *Thompson* plaintiffs against PECO is based on the rate regulations established by the Pennsylvania Public Utility Commission under which PECO may pass onto its customers any increase in the cost of fuel. 5 Pa. Bul. 1418 (1975). The *Thompson* plaintiffs contend that there is a corollary fiduciary duty imposed on PECO to protect its customers from unreasonable fuel cost increases. Because PECO has taken no action against Gulf or Texas Eastern and has failed to intervene in the proceedings before the FPC, the *Thompson* plaintiffs urge that

PECO has violated this duty. If such a duty exists it is mandated by state law. Therefore, diversity of citizenship between the parties is necessary for this court to have jurisdiction over that claim.[6]

The Natural Gas Act does not confer jurisdiction over PECO which distributes gas intrastate to ultimate users on a local basis. The statute at 15 U.S.C. §717(b) provides:

> The provisions of this Act [15 U.S.C. §717 et seq.] shall apply to the transportation of natural gas in interstate commerce . . . , but shall not apply to any other transportation or sale of natural gas or to the local distributions of natural gas . . .

Therefore, the Natural Gas Act does not provide a basis for federal subject matter jurisdiction.

Plaintiffs recognize that this court lacks subject matter jurisdiction over the cause of action alleged against PECO, but suggest that pendent party jurisdiction exists in accordance with dicta set forth in *Aldinger v. Howard*, — U.S. —, 49 L.Ed. 2d 276 (1976). *Aldinger* does not preclude the possibility of federal jurisdiction in certain instances "where the party impleaded is not otherwise subject to federal jurisdiction". However, the concept of pendent party jurisdiction should not be applied in this factual context. Jurisdiction over the claim pleaded by the *Thompson* plaintiffs that PECO failed to discharge its fiduciary responsibilities to protect its customers is exclusively a matter for the Pennsylvania Public Utilities Commission. This claim against PECO is unrelated to the operative facts of the federal claims against Gulf and Texas Eastern. Therefore, the motion of PECO to dismiss will be granted without prejudice. The *Thompson* plaintiffs may, if they so desire, pursue their claim against PECO before the Pennsylvania Public Utilities Commission.

TEXAS EASTERN'S MOTION TO DISMISS

Both the *Clark* and *Thompson* plaintiffs have pleaded an antitrust violation against Texas Eastern. Plaintiffs aver:

> Gulf, in combination with Texas Eastern, has withheld gas from delivery to Texas Eastern for the inter-

6. See 28 U.S.C. §1332.

state market and both defendants have otherwise engaged in activities resulting in restraint of trade or commerce among the several states.

In both cases the sole claim against Texas Eastern is alleged antitrust violations as averred in the above-quoted statement.

Texas Eastern urges that exclusive jurisdiction is vested in the FPC to determine antitrust violations and that this court has no independent jurisdiction because the rates charged for natural gas are approved by the FPC. Texas Eastern relies on *McLeran v. El Paso Natural Gas Company*, 357 F.Supp. 329, 331 (S.D. Tex. 1972) for the following proposition:

> This Court . . . holds that the FPC has exclusive jurisdiction to determine the rates which a natural gas supplier may charge its customers of natural gas destined for resale; and, that a rate within the limits set by the FPC may not be challenged in an antitrust proceeding in a federal district court.

This court certainly concurs with *McLeran* that the antitrust laws cannot be used to interfere with the rate making powers of the FPC. However, the plaintiffs in both cases contend that Texas Eastern combined with Gulf to withhold the delivery of natural gas in order to extract a higher price from the ultimate consumers of the product.

In the case of *Otter Tail Power Co. v. United States*, 410 U.S. 366, 372 (1973), the Supreme Court stated:

> 'Repeals of the antitrust laws by implication from a regulatory statute are strongly disfavored and have only been found in cases of plain repugnancy between the antitrust and regulatory provisions.'

Accord, Intermar, Inc. v. Atlantic Richfield Co., 364 F.Supp. 82 (E.D. Pa. 1973). In the case before this court there has been no showing, nor does this court find clear repugnancy between the antitrust and the regulatory statutes. In addition there has not been a showing that the FPC has been given exclusive jurisdiction as in the *McLeran* case.

Quite to the contrary, Congress has placed the primary burden for enforcing the antitrust laws on the courts. In *City of Pittsburgh v. Federal Power Commission*, 237 F.2d 741

(D.D.C. 1956) the court stated that the FPC has no power to enforce the Sherman Act and cannot decide whether a violation of the antitrust laws has taken place. More specifically, in *California v. F.P.C.*, 369 U.S. 482, 490 (1962), it was held that the district court and not the FPC should decide the issue of whether the acquisition of the stock of Pacific Northwest Pipeline Corporation by El Paso Natural Gas Company was violative of the antitrust laws. In reaching this decision, Mr. Justice Douglas observed:

> It is not for us to say that the complementary legislative policies reflected in §7 of the Clayton Act on the one hand and in §7 of the Natural Gas Act on the other should be better accommodated. Our function is to see that the policy entrusted to the courts is not frustrated by an administrative agency. Where the primary jurisdiction is in the agency, courts withhold action until the agency has acted. Texas & P.R. Co. v. Abilene Cotton Oil Co. 204 US 426, 51 L ed 553, 27 S Ct 350, 9 Ann Cas 1075. The converse should also be true, lest the antitrust policy whose enforcement Congress in this situation has entrusted to the courts is in practical effect taken over by the Federal Power Commission. Moreover, as noted, the Commission in holding that 'any lessening of competition is not substantial' was in the domain of the Clayton Act, a domain which is entrusted to the court in which the antitrust suit was pending.

Here, plaintiffs do not complain about the rate approved by the FPC. The gravamen of their antitrust claim relates to an alleged agreement to make underdeliveries in an attempt to circumvent the approved interstate rates by increasing, at the expense of the plaintiffs, the amount of gas available for intrastate sales. Therefore, Texas Eastern's motion to dismiss the antitrust claim on the ground that sole jurisdiction is vested in the FPC will be denied.

Another basis for Texas Eastern's motions to dismiss the antitrust claim is that this cause of action is not properly pleaded. Texas Eastern characterizes the above-quoted portion of the complaint as a "bare bones statement of conspiracy" which is insufficient to withstand a motion to dismiss. Understandably, plaintiffs argue that proof of an antitrust con-

spiracy is uncovered only after extensive and voluminous discovery and that it would be unfair and against public policy to require an antitrust plaintiff to have proof positive of anticompetitive practices before being permitted to bring suit. I concur with the plaintiffs in this respect although it is undeniable that the alleged antitrust violations are "bare bones" in nature. However, at the on-the-record oral argument, counsel for the plaintiffs stated that he can prove the existence of a conspiratorial agreement between Gulf and Texas Eastern to withhold delivery of natural gas. Therefore, Texas Eastern's motion is premature and discovery should be permitted on the antitrust issue. In *Murchison v. Kirby*, 27 F.R.D. 14, 18 (S.D.N.Y. 1961), Judge Weinfeld stated:

> Obviously there are instances where the facts to support a charge necessarily come from sources other than the litigant, and this is particularly true in conspiracy cases. . . . To require a plaintiff charging a conspiracy to have personal knowledge of essential evidence necessary to sustain the allegations of his complaint would, in most instances, debar the maintenance of the action.

See also Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134 (1968); *State of Illinois v. Harper & Row Publishers, Inc.*, 301 F.Supp. 484 (N.D. Ill. 1969). Note is made of Texas Eastern's argument that the alleged anticompetitive activities of Texas Eastern are limited to an acquiescence to Gulf's under-delivery. Texas Eastern suggests that there is no precedent to support an antitrust claim where the defendant has acted only passively. However, in light of the aforesaid representation of plaintiff's counsel at oral argument, resolution of this issue will be deferred until discovery is afforded to the plaintiff.

Finally, Texas Eastern maintains that the plaintiffs lack standing to bring an antitrust action because they are indirect purchasers of the products involved. In this respect, Texas Eastern relies on *Philadelphia Hous. A. v. American Radiator & S. San. Corp.*, 50 F.R.D. 13, 30 (E.D. Pa. 1970), *aff'd sub nom., Mangano v. American Radiator & Standard San. Corp.*, 438 F.2d 1187 (3d Cir. 1971). However, in *Cromar Co. v. Nuclear Materials & Equipment Corp.*, 543 F.2d 501, 508 (3d Cir. 1976), it was held that standing in an antitrust case depends upon "a detailed analysis on a case by case basis of the factual context presented". On the record now before the court there is insufficient information to determine whether the plaintiffs have standing. Therefore, Texas Eastern's motions to dismiss on the standing issue will be denied, but leave will be given to Texas Eastern to raise the standing issue following discovery on all antitrust issues.

GULF'S MOTION TO DISMISS

Gulf is a defendant in both the *Clark* and *Thompson* actions. Gulf's motions to dismiss the antitrust claims will be denied for the reasons set forth in the discussion of Texas Eastern's motion to dismiss those claims.

Plaintiffs have pleaded another cause of action against Gulf. They contend that there is a private right of action under the Natural Gas Act and that 28 U.S.C. §1331 and 28 U.S.C. §1337 confer subject matter jurisdiction. Plaintiffs assert that they may recover money damages from Gulf for its alleged breach of the contract certified by the FPC. Gulf argues that this cause of action does not arise under a federal statute, and therefore, no jurisdiction exists.

An analysis of whether a private right of action exists under the Natural Gas Act should begin with *Cort v. Ash*, 442 U.S. 66 (1975). In the *Cort* case the Supreme Court lists several factors in determining whether a private right of action is implicit in the statute.

> First, is the plaintiff 'one of the class for whose *especial* benefit the statute was enacted,'. . . Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? . . . Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? . . . And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

Insight can be gained as to whether the *Cort* standards are met by assuming that a private right of action exists

under the Gas Act and analyzing the results. The questions of whether Congress intended to create or deny a private right of action and whether an implied right of action is consistent with the underlying legislative scheme will be discussed together. The FPC has already determined that Gulf and Texas Eastern were in violation of the certificate of public convenience issued December 19, 1963, and have fashioned what, in their view, is an appropriate remedy. An appeal from the FPC opinions and orders has been taken to the Third Circuit Court of Appeals and is presently pending there.

Because the FPC has already found that the Gas Act has been violated by Gulf, the initial inquiry should be to determine the effect of those findings of fact. If this court would conduct an administrative review of the findings of fact made by the FPC, there would be duplication of effort because that function has been allotted to the Court of Appeals by the statute. 15 U.S.C. §717r(b).

Consequently, this court would be required to defer to the Court of Appeals in regard to any administrative review of the findings of fact made by the FPC. The role of this court would necessarily be relegated to providing remedies in addition to those fashioned by the FPC. Under the regulatory scheme, the FPC is authorized to provide monetary relief in the form of rate adjustments and refunds or issue declaratory orders.[7] The FPC is also authorized to obtain enforcement of its decisions in the district court. 15 U.S.C. §717s. The FPC is in a more advantageous position to develop remedies that enhance the purposes of the regulatory scheme. The legal problems related to the shortage of natural gas do not lend themselves to piecemeal solutions by separate district court decisions. The result would be a fragmented and colloquial approach to the national problem of equitable distribution of natural gas. The problem requires a coordinated and uniform approach by the FPC. By permitting a private right of action, this court would sanction interference with the congressional intent to provide regulation and remedies on a national scale.[8]

7. *See* 15 U.S.C. §717o; FPC v. Louisiana Power & Light Co., 406 U.S. 621 (1972).

8. The authority of the FPC to protect the public interest has been given broad construction commensurate with the Commission's responsibilities. Permian Basin Area Rate Cases, 390 U.S. 747, 776 (1968).

Congress has established a procedure for those who are aggrieved by a decision of the FPC. That procedure is an appeal to the Court of Appeals. In the case of *Polansky v. Trans World Air Lines, Inc.*, 523 F.2d 332 (3d Cir. 1975), the court held that a private right of action should not be implied from a federal regulatory statute because the statute has already designated a specific means to vindicate the public wrongs, and that a private remedy would undercut the goals of the statutory scheme.

If, on the other hand, this court concluded that it was proper for it to conduct a *de novo* hearing on all issues before it, a jury might reach factual conclusions different from those of the FPC which in the interim may have been found by the Court of Appeals to be supported by substantial evidence.

The hypotheticals mentioned above demonstrate that a private right of action would introduce chaos, confusion and duplication into the regulatory scheme. I conclude that the implication of a private right of action would not further the purposes of the Gas Act. Also, these considerations negate any congressional intent to establish a private right of action.

Another *Cort* standard is whether the cause of action is one traditionally relegated to state law. In order to apply this guideline, the court should consider not only the state remedies available to the plaintiff but also other applicable federal remedies. In the case of *Farmland Indus., Inc. v. Kansas-Nebraska Nat. Gas. Co., Inc.*, 349 F.Supp. 670 (D.Neb. 1972), *aff'd* 486 F.2d 315 (8th Cir. 1973), it was stated:

> Where other remedies exist, federal courts are loathe to declare the creation of a new one by reference.

In the *Farmland* case, the plaintiffs sought damages for abandonment of defendant's certificated service to the plaintiff without the approval of the FPC. Under 15 U.S.C. §717f(b), certificated service cannot be abandoned without the approval of the FPC. Because the contract between the parties in *Farmland* had expired, the plaintiff did not have any contractual right to recover from its supplier. Both the district court and the circuit court held that under the facts of *Farmland* the plaintiff had a private right of action under the Natural Gas Act to obtain damages for the abandonment. The

primary reason for permitting the private cause of action was that, unless a private right existed, the plaintiff would have no remedy to seek redress for the abandonment.

In the case at bar the plaintiffs have several remedies other than a private right of action under the Gas Act available to them. To begin with both PGW and customers of PGW were permitted to intervene in the FPC proceedings which resulted in Opinion No. 780 and an accompanying order in which the FPC found that Gulf failed to fulfil its delivery responsibilities to Texas Eastern.[9] As a result of this opinion and order, Gulf is required to pay refunds to Texas Eastern. These refunds are to be flowed-through to Texas Eastern's customers. In addition, the plaintiffs may attempt to remedy the alleged wrongs in federal court pursuant to the antitrust laws and in state courts by alleging various contract and third-party beneficiary causes of action. Further redress may be available to the *Thompson* plaintiffs in proceedings before the Pennsylvania Public Utilities Commission.

From the above discussion it is clear that this case can be distinguished from *Farmland* and that the availability of other state and federal remedies render this case inappropriate for implication of a private statutory right of action.

The above analysis demonstrates that some tests of *Cort v. Ash, supra,* are not met.[10] The overall thrust of *Cort v. Ash, supra,* is that implied private rights of action based on federal regulatory legislation are to be found in very limited circumstances. Therefore, this court declines to infer a private right of action as urged by the plaintiffs. Because of the national crisis in the supply of natural gas and the possible conflict between this court's decision and the decision in *Farmland, supra,* certification under 28 U.S.C §1292(b) will be granted on the issue of the availability of a private right of action under the Natural Gas Act. This is a controlling question of

9. Paragraph (C) of the Order accompanying Opinion 780-A suggests the possibility of a private right of action to obtain recompense for losses not compensated under the FPC's refund plan. However, there appears to be no reason why the FPC cannot, under its statutory authority, adjudicate those additional claims on an administrative basis.

10. The first test of Cort v. Ash, *supra* will not be discussed. Although the plaintiffs may be able to prove that they are within the class for whose benefit the statute was enacted, this would not be enough to overcome the fact that the three other Cort tests are not met.

law and there is a substantial basis for difference of opinion.[11] More importantly, the FPC Orders Nos. 780 and 780-A are presently on appeal to the Third Circuit Court of Appeals, and therefore, that court, in exercising its discretion may wish to permit an interlocutory appeal on this issue to expedite resolution of this matter.

The plaintiffs also seek to recover damages from Gulf for breach of contract as third-party beneficiaries of the contract between Gulf and Texas Eastern. This is a state law claim and there is no diversity of citizenship between plaintiffs and Gulf. However, plaintiffs maintain that this court should exercise pendent subject matter jurisdiction over that claim. I decline to take jurisdiction of a state law contractual claim as being pendent to the alleged antitrust claim. The basic operative facts underlying the alleged antitrust claims are dissimilar to the contract dispute. It is only where the pendent claim arises out of the same set of operative facts as the federal claim that pendent jurisdiction should be exercised. *See Aldinger v. Howard,* — U.S. —, 49 L.Ed. 276 (1976). Therefore, plaintiff's state law claims as third-party beneficiaries of the contract between Gulf and Texas Eastern will be dismissed.

PGW'S MOTION TO DISQUALIFY COUNSEL FOR THE CLARK AND THOMPSON PLAINTIFFS

In both *Clark* and *Thompson* the plaintiffs purport to be adequate class representatives for all consumers of gas in Philadelphia and Philadelphia County. One of the requirements to maintain a class action is that the class representatives and their counsel will adequately represent the interest of the class. Fed. R. Civ. P. 23(a)(4). PGW's motion to disqualify counsel for the *Clark* and *Thompson* plaintiffs will be considered in conjunction with the class action motion. However, discovery on the class action issue under the antitrust count is to proceed.[12]

/s/
Edward N. Cahn, J.

11. See the suggestion of the availability of a private right of action in FPC Opinion 780-A.

12. Manual for Complex Litigation, Part I. §0.50 (rev. ed. 1973).

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MILTON CLARK, *et al.*
v. Civil Action No. 76-2106
GULF OIL CORPORATION, *et al.*

THEODORE Q. THOMPSON, *et al.*
v. Civil Action No. 76-2711
GULF OIL CORPORATION, *et al.*

ORDER

AND NOW this 29th day of March, 1977, IT IS ORDERED as follows:

1. The motions of the plaintiffs to consolidate both cases are GRANTED.

2. The motion of Philadelphia Gas Works to intervene in Civil Action No. 76-2106 is GRANTED.

3. The motion of Philadelphia Gas Works as intervenor to file an amended complaint is DENIED.

4. The motion of Gulf Oil Corporation to strike reference in the pleadings and briefs to the decision of the administrative law judge in regard to his views as to whether anticompetitive acts have been committed is DENIED.

5. The motions of Texas Eastern Transmission Corporation to dismiss the complaints against it in both cases are DENIED.

6. The motions of Gulf Oil Corporation to dismiss the complaints against it based on a private right of action under the Gas Act are GRANTED.

7. The motions of Gulf Oil Corporation to dismiss the claims against it based upon the plaintiffs' being third party beneficiaries of Gulf's contract with Texas Eastern Transmission Corporation are GRANTED for lack of subject matter jurisdiction.

8. All other motions to dismiss by Gulf Oil Corporation are DENIED.

9. Discovery shall proceed forthwith on the antitrust issues and the class action issue.

BY THE COURT:

/s/
Edward N. Cahn, J.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MILTON CLARK, *et al.*
v.
GULF OIL CORPORATION, *et al.*
Civil Action No. 76-2106

THEODORE Q. THOMPSON, *et al.*
v.
GULF OIL CORPORATION, *et al.*
Civil Action No. 76-2711

ORDER

AND NOW this 29th day of March, 1977, IT IS ORDERED that the motion of Philadelphia Electric Company to dismiss the complaint against it in Civil Action No. 76-2711 is GRANTED without prejudice.

BY THE COURT:

/s/
Edward N. Cahn, J.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MILTON CLARK, *et al.*
v. Civil Action No. 76-2106
GULF OIL CORPORATION, *et al.*

THEODORE Q. THOMPSON, *et al.*
v. Civil Action No. 76-2711
GULF OIL CORPORATION, *et al.*

ORDER

AND NOW this 29th day of March, 1977, IT IS ORDERED that certification is granted pursuant to 28 U.S.C. §1292(b) to permit plaintiffs to seek an interlocutory appeal on the issue of whether plaintiffs may pursue a private right of action against Gulf Oil Corporation under the National Gas Act.

This is a controlling question of law and there is a substantial basis for difference of opinion. The FPC Orders Nos. 780 and 780-A are presently on appeal to the Third Circuit Court of Appeals. That court, in exercising its discretion, may wish to permit an interlocutory appeal on this issue to expedite resolution of the entire controversy.

BY THE COURT:

/s/
Edward N. Cahn, J.

APPENDIX D

NATURAL GAS ACT
Public—No. 688—75th Congress
Chapter 556—3d Session
[H.R. 6586]

*   *   *   *

Extension of Facilities; Abandonment of Service

Section 7

*   *   *   *

(b) No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment. [52 Stat. 824 (1938); 15 U.S.C. § 717f(b)]

(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *provided, however,* That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety-days after the effec-

tive date of this amendatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest. [52 Stat. 825 (1938), as amended, 56 Stat. 83 (1942); 15 U.S.C. § 717f(c)]

* * * *

(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require. [56 Stat. 84 (1942); 15 U.S.C. § 717f(e)]

* * * *

Jurisdiction of Offenses; Enforcement of Liabilities and Duties

Section 22

The District Courts of the United States and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this chapter or the rules, regulations, and orders thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by, or to enjoin any violation of, this chapter or any rule, regulation, or order thereunder. Any criminal proceeding shall be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by, or to enjoin any violation of, this chapter or any rule, regulation, or order thereunder may be brought in any such district or in the district wherein the defendant is an inhabitant, and process in such cases may be served wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 225 and 347 of Title 28. No costs shall be assessed against the Commission in any judicial proceeding by or against the Commission under this chapter. [52 Stat. 833 (1938), as amended, 62 Stat. 875, 895 (1948); 15 U.S.C. § 717u]